

STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL SERVICES  
WASTE MANAGEMENT COUNCIL

Appeal of Regenesys Corporation

Docket No. 05-09 WMC

**RECEIVED**

JUN 19 2006

**DEPARTMENT OF ENVIRONMENTAL SERVICES**  
**MOTION FOR CLARIFICATION OR IN THE ALTERNATIVE,**  
**RECONSIDERATION**

NOW COMES the Department of Environmental Services ("Department"), by and through its attorneys, the Office of the Attorney General, and seeks clarification, or in the alternative reconsideration, of the Council's written decision issued May 30, 2006 in this matter ("Decision"). Specifically, the Department asks that the Council clarify or strike the final sentence of its "Findings and Conclusions" section, Decision at 5, on the following grounds:

1. In the Decision, the Council denies Regenesys' appeal, and affirms the conclusions of Assistant Commissioner Michael J. Walls. For all the reasons explained in the Department's previous presentations and written submissions, the Department agrees that this is the correct result in this case. However, the Council also concluded that "the certification language for 'existing' permittee per RSA 149-M:9 is limited to existing officers, directors or partners not past officers, directors or partners." Decision at 5. The final sentence in the Decision's Findings and Conclusions section, as written, is inconsistent with the Council's decision to dismiss the appeal.

2. In his decision, Hearing Officer Walls specifically concluded that William Dell'Orfano's certification that no officer or director of Bio Energy Corporation had been convicted of a felony during the previous five years was false and misleading, because former director Anthony DiNapoli had been convicted of felony witness tampering less than a year prior to the certification. Hearing Officer Walls' conclusion, based on a number of factual findings, was a central basis for revocation of the solid waste permit.

3. By dismissing the appeal, the Council appears to confirm all of the hearing officer's conclusions, including the conclusion that the certification was false and misleading. However, the final sentence of the Decision's "Findings and Conclusions" could create significant confusion about the Council's intentions. Under the reasoning reflected in the final sentence, Mr. Dell'Orfano was arguably not required to disclose Mr. DiNapoli's witness tampering conviction, because Mr. DiNapoli resigned from Bio Energy Corporation prior to the date of the certification. Regensis will likely use this language to argue on appeal that the Council disagreed with Officer Walls' conclusion that the certification was false and misleading.

4. The question presented to this Council with respect to the certification is a narrow one: whether, on the basis of all the evidence before him in the revocation proceeding, Hearing Officer Walls erred in concluding that Mr. Dell'Orfano's certification violated regulatory prohibitions on submitting false or misleading information in support of a solid waste permit application. From the Council's overall decision, it appears that the Council agrees with the Department that Hearing Officer Walls committed no error. In other words, on the facts of this case, the

Council appears to agree that this particular certification was false and misleading. Given the strong likelihood of further appeal, the Department asks the Council specifically to articulate its decision on the narrow issue presented.

5. The Department's understanding of the Council's final sentence is that the Council was concerned that a broad interpretation of its decision could in some other case lead to an absurd result, such as DES requiring disclosure of a conviction of a person who had long ago been affiliated with a company, but who, at the time of the application, had no role with the applicant. The Department agrees with the Council that it makes sense to avoid unreasonable application of regulatory requirements, and the agency would be glad to consider making a rule change to ensure that the regulatory requirements as applied to future applicants in this area are clear. However, in the Department's view, there is no lack of clarity about what was required in this particular case. Thus, the Council's final sentence goes beyond the case presented and, as framed in the current written decision, may result in an order from the Supreme Court requiring further review by the Council.

WHEREFORE, the Department respectfully requests that the Council:

A. Clarify or strike the final sentence of its "Findings and Conclusions" section, and

B. Grant such other and further relief as is just and proper.

Respectfully submitted,


THE STATE OF NEW HAMPSHIRE  
DEPARTMENT OF ENVIRONMENTAL  
SERVICES

By its attorneys,

KELLY A. AYOTTE  
ATTORNEY GENERAL

June 16, 2006

By:

**COPY**  
  
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CERTIFICATE OF SERVICE

I hereby certify a that a copy of the foregoing *Motion for Clarification or in the Alternative, Reconsideration* has on this 16th day of June 2006, been mailed first class postage prepaid to Edward A. Haffer, Esquire, John-Mark Turner, Esquire, Barry Needleman, Esquire, N. Jonathan Peress, Esquire, John E. Friberg, Jr., Esquire, Ronald J. Lajoie, Esquire and Jeffrey L. Roelofs, Esquire.

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Jennifer J. Patterson